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IN THE Supreme Court of United States

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ANDREW W. SMYTHE ET ALS., Plaintiffs in Error,

VERSUS

THE UNITED STATES, Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR, WM. H. BYRNES, ADMINISTRATOR, ETC.

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Statement of the Case.

This suit comes into this Court by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit. Suit was brought by the United States in the Circuit Court for the Eastern District of Louisiana against Andrew W. Smythe and the sureties on his official bond as Superintendent of the United States Mint at New Orleans, to recover the sum of $25,000, which, it is alleged, he received as such Superintendent and failed to account for as required by law and the conditions of his bond.

In that court, the plaintiff in error, for exception to the petition, alleged that it did not disclose a cause of action, because other officers of the Mint, charged by law with the

care and custody of the monies of the Mint, had possession of such monies, which never came into the custody of the Superintendent, and were chargeable therewith under their bonds. This exception was referred to the merits by the order of the Circuit Court.

Thereupon, the defendants filed separate answers, each in the following language:

"Now into this Honorable Court comes William H. Byrnes, administrator of the Succession of Edward Conery, deceased, one of the defendants in said cause, by his attorneys, and for answer to plaintiff's petition, denies generally the allegations therein contained.

"And further answering, this respondent alleges and avers, that the amount of $25,000, the alleged deficiency of Andrew Woods Smythe, on his official bond, as Superintendent of the Mint of the United States, at New Orleans, Louisiana, herein sued for, was occasioned by a fortuitous event, to-wit: a fire, in no way attributable to said Superintendent, or his employees, which occurred in the vault of the cashier of said Mint, between Saturday, June 24th, and Monday, June 26th, 1893, by and through which event the said sum in the currency of the United States, was charred, burnt, and destroyed, and the box containing the same was turned over to the agents and representative of the plaintiff for examination and investigation.

"That the destruction of said currency having occurred by such fortuitous event, the said Andrew Woods Smythe, and the sureties on his official bond, are in no way liable or responsible therefor, and said event is not covered by, or included within the terms and conditions of said official bond; all of which will appear more fully and at large, from the evidence which will be exhibited on the trial of this case.

"Wherefore, this respondent prays to be hence dismissed with costs, and for general relief."

Much evidence was offered *pro* and *con* upon the issues tendered by the pleadings.

On the part of the Government, evidence was tendered to show the appointment of Smythe as Superintendent of the Mint at New Orleans; the execution of the bond by the plaintiffs in error; the receipt of various sums of money by Smythe, and his failure to account for a deficiency of $25,000 in United States treasury notes. Further evidence was offered by the Government tending to show that a fire had taken place in the steel vault provided by the Government for the safekeeping of funds in the custody of the Superintendent; that a tin box containing paper currency had been destroyed by fire, and that a count of its contents by the Government experts disclosed that it had originally contained only $1182.

Evidence was offered by the plaintiffs in error, and received and submitted to the jury without objection, tending to show that there was a fire in the vault of the mint, not due to the negligence of the superintendent or his agents and employees; that United States treasury notes to the amount of $25,000, contained in the bank box, were charred, burnt and destroyed; that the Government, through its authorized agents, took possession of the box and the burnt money, and that same had ever since remained in the custody and control of the Government. There was no conflict in the evidence except as to the amount of money contained in the bank box. The Government's witnesses testified that there was only $1182 in the box; whereas, the witnesses of the plaintiffs in error testified particularly that the box, when it was burned, contained $25,000 in United States treasury notes.

Upon the conclusion of the testimony, the court taking the view that the facts set up in the answer, if proven, and

the evidence adduced, would not constitute a defense, directed the jury to find for the United States, and refused all of the charges asked for by the plaintiffs in error.

A writ of error was sued out to review the judgment of the Circuit Court, but, on hearing, the judgment of that court was affirmed, and thereupon the plaintiffs in error brought the case to this Court for a review of the judgment of the Circuit Court of Appeals.

Assignment of Errors.

In this Court plaintiffs in error assigned the following errors in the opinion and decree of the Circuit Court of Appeals (Trans. p. 226) :

1. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against the said plaintiffs in error and in favor of the defendant in error upon the trial of said cause.

2. The said Circuit Court of Appeals erred in holding that the Circuit Court committed no error in overruling the exception of no cause of action filed by these plaintiffs in error on December 3, 1894.

3. The said Circuit Court of Appeals erred in holding that the Circuit Court committed no error in refusing to charge the jury, as requested by the plaintiffs in error, as follows, to-wit :

"If the jury believe from the evidence that the money representing the deficiency in the accounts of the defendant A. W. Smythe was stored in a vault provided by the United States for the safekeeping of the public funds in his custody, and that while so stored the same was destroyed by a fire, and that such fire was accidental and

not caused by the fault or negligence of the said A. W. Smythe or the sureties on his official bond, then they will find a verdict for the defendants."

4. The said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error in refusing to charge the jury, as requested by these plaintiffs in error, as follows, to-wit:

"If the jury believe from the evidence that the alleged deficiency of $25,000 was contained in the bank box in said vault in the form of paper currency, viz., United States treasury notes, and that all of said money was destroyed by fire while so contained in said vault, and that the remains and debris thereof were delivered by said Smythe to the proper representatives of the United States Government who were authorized to receive it, then I charge you that under the evidence the Government has not suffered any substantial damages by the destruction of its own obligations, and your verdict, if in favor of the plaintiff, can in no event exceed nominal damages."

5. The said Circuit Court of Appeals erred in holding that said Circuit Court committed no error in refusing to charge the jury, as requested by these plaintiffs in error, as follows, to-wit:

"The court having refused the other charges asked for, and without any waiver whatever, the defendants ask the court to charge the jury to give credit to the defendants for all the money identified and turned over to the United States."

6. The said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error in directing the verdict in favor of the defendant in error and against the plaintiffs in error upon the trial of said cause.

7. The said Circuit Court of Appeals erred in affirming the jugment of said Circuit Court, entered upon the ver-

dict of the jury, in allowing interest on the amount of the principal sum of the judgment, to-wit., $25,000, against the plaintiffs in error, Byrnes and Stempel, in their respective capacities, at the rate of 6 per cent. per annum from April 1, 1893, until paid, when by the plaintiff's own evidence it appears that no demand was made upon said sureties prior to the 9th day of February, 1894.

8. The said Circuit Court of Appeals erred in affirming the judgment and decree of said Circuit Court in rendering an absolute judgment against the plaintiff in error, William H. Byrnes, as administrator of the Succession of Edward Conery, deceased, in the sum of $25,000, with interest thereon at the rate of 6 per cent. per annum, from April 1, 1893, until paid, and all costs of court, inasmuch as by law said judgment should have been rendered payable only in due process of administration of said Succession of Edward Conery.

And for these and other errors apparent on the face of the record, plaintiffs in error pray that the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the judgment and decree of the Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, in this cause be reversed, and that same be remanded to that court for a *venire de novo*.

Points Covered by This Brief.

The errors assigned will be discussed under the following points:

I.

The Circuit Court erred in directing the verdict in favor

of the defendant in error, and in refusing to charge the jury as set forth in third assignment of error. The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court.

II.

The Circuit Court erred in refusing to charge the jury as set forth in the fourth assignment of error, and in holding that the defendant in error was entitled to recover substantial damages under the evidence adduced. The Circuit Court of Appeals erred in affirming the action of the Circuit Court.

III.

The Circuit Court erred in directing the jury to find a verdict for the defendant in error for twenty-five thousand dollars, when the Government's own evidence showed that the deficiency was only $23,818. The Circuit Court of Appeals erred in affirming said judgment.

IV.

The Circuit Court erred in allowing the defendant in error to recover interest on the principal sum from April 1, 1893, and the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in that respect.

V.

The Circuit Court erred in rendering an absolute judgment against Wm. H. Byrnes as administrator, instead of one payable in due course of administration of the succession of Edward Conery, and the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in that respect.

ARGUMENT.

FIRST POINT.

The Circuit Court erred in directing the verdict in favor of the defendant in error and in refusing to charge the jury as set forth in the Third Assignment of Error. The Circuit Court of Appeals erred in affirming the rulings of the Circuit Court.

(Assignments of Error Nos. 6 and 3).

The general charge directing a verdict in favor of the United States was predicated on the assumption that the destruction by fire of the $25,000 in currency, without the fault of the Superintendent of the Mint, did not relieve him of liability to account for the same under his bond. This question ought to have been raised by objection to the introduction of evidence in support of the answer of the plaintiffs in error, or by a motion to strike out this special defense, which would have saved the expense of bringing up such a voluminous record.

But as the Court has certified the ground upon which the charge was based, we may consider that all evidence tending to support this special defense was withdrawn from the jury. We shall, therefore, for the present address ourselves to the argument of this question. The learned Judge of the Circuit Court seems to have based his ruling on the theory that a bond of an officer charged with the safekeeping of public funds, creates an absolute liability to respond with the money at all events, without regard to the existence of any cause whatever that may prevent his compliance with its condition.

It must be confessed that there are many conflicting de-

cisions on the subject, both in this country and in England, and that until the case of **United States vs. Thomas, 15 Wall. 337,** came before it, the Supreme Court had apparently expressed views somewhat adverse to our position. In that case, however, Mr. Justice Bradley, with his usual learning and research, after a review of a great number of decisions, came to the conclusion that the liability of a fiscal officer of the United States was that of a simple bailee, notwithstanding the conditions contained in a bond of the character of the one here involved. He, therefore, very logically held that the officer did not become a debtor on his bond until he had committed a breach of duty.

In reviewing those cases, he commented on the fact that, in most of them, undue stress had been laid on the terms of the bond, as forming the basis of a new rule of responsibility; and that the learned Judges, in a majority of them, overlooked the vital distinction between an absolute agreement to do a thing, and a condition to do the same thing inserted in a bond. But his conclusion was that in the latter case the obligor is not bound at all events to perform the condition, but is excused from its performance, when prevented by the law, or an overruling necessity. And he cites the rule laid down in such cases by Lord Coke, as follows:

"In all cases where the condition of a bond or recognizance, etc., is possible at the time of making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, etc., there the obligation is saved."

The basis of liability, says the Court in that case, is founded on the doctrine of Bailment:

"A public officer having property in his custody in his

official capacity is a bailee, and the rules which grow out of that relation are held to govern the case. But the Legislature can, undoubtedly, at its pleasure change the common law rule of responsibility. Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility."

The general rule is well settled that a bailee is excused from liability for property destroyed in his possession by fire.

2 Am. & Eng. Ency. of Law (2 Ed.), 748.

Story on Bailments, Sec. 29.

Meridian Fair vs. North Birmingham, etc., 70 Miss. R. (12 Southern R. 555).

This being the rule, there is no reason why a fire is not as much an overruling necessity in this case as *vis major* was held to be in the Thomas case.

The federal cases cited as establishing a different doctrine, go no further than to hold that a receiver of public money cannot plead theft to relieve himself of liability as an ordinary bailee may. This exception to the general rule is predicated on a supposed public policy, which cannot be said to extend beyond that class of cases, and which certainly has not as yet been applied by the courts to cases where public money has been destroyed by fire, shipwreck, earthquakes, or other overruling causes. Indeed, it was said in **Boyden vs. United States, 13 Wallace, 17,** that if a receiver of public money were an ordinary bailee, he would be relieved by proof that the money had been destroyed by fire, or stolen, or taken by irresistible force.

Mr. Justice Strong, who wrote the opinion, seems to have thought, but erroneously, as was held in the Thomas case, that the bond created a new rule of liability. But as the defense was theft, the decision was no doubt correct, although his construction of the bond was clearly erroneous when tested by the latter decision.

The only case in point recently decided is that of **United States vs. Humason, 6 Sawyer, 199,** in which Judge Deady followed the rule laid down in the Thomas case, holding that loss of public money by shipwreck will relieve an officer from liability to account therefor.

Having proved at the trial that the money in this case was destroyed by fire, the defendants could not be held liable unless the Superintendent of the Mint, or his servants, were shown to have been guilty of negligence.

Whether a fire, the alleged and admitted cause of the loss of the money herein, comes within the class of defenses that may be pleaded by an officer in discharge of his liability, is for the Court to decide.

But whether there has been such negligence as will deprive him of the benefit of the defense, is a question for the jury.

Preston vs. Prather, 137 U. S. 604.

We submit, therefore, that the Circuit Court erred in refusing to charge the jury: "If the jury believes from the evidence that the money representing the deficiency in the accounts of defendant, A. W. Smythe, was stored in a vault provided by the United States for the safekeeping of the public funds in his custody, and that while so stored, the same was destroyed by a fire; that such fire was accidental and not caused by the fault or negligence of the said A. W.

Smythe, or the sureties on his bond; then they will find a verdict for the defendants," as set out in the bill of exceptions No. 2 (Tr. p. 18), and in the assignment of errors (Tr. p. 227).

And also for the foregoing reasons the Court erred in taking the case from the jury and directing a verdict in favor of the United States, as set out in bill of exceptions No. 1 (Tr. p. 16).

SECOND POINT.

The Circuit Court erred in refusing to charge the jury as set forth in the Fourth Assignment of Error, and in holding that the defendant in error was entitled to recover substantial damages under the evidence adduced. The Circuit Court of Appeals erred in affirming the action of the Circuit Court.

(Assignment of Error No. 4).

On the trial of the case in the Circuit Court, the plaintiffs in error offered evidence tending to show that the alleged deficiency was caused by the accidental burning of paper currency amounting to $25,000, while same was contained in a tin box in the vault of the mint; that this currency consisted of United States treasury notes of various denominations. (Test. Smythe, 3d Interrogatory, Trans. p. 205). The testimony of the Government as to the character of this currency was to the same effect (Trans. p. 187), so, as to this latter fact, there was no dispute. Further, the testimony of the plaintiffs in error showed, and same was not contradicted, but, on the contrary, admitted, that the entire debris of this burnt money was delivered by Smythe to the authorized representatives of

the Government, who have ever since held same for the Treasury Department.

While it was admitted by the Government that it did receive the entire burnt contents of this bank box, it offered evidence tending to show that an examination of the debris by its experts disclosed that there had been only $1182 in treasury notes in the box. On the other hand, the testimony offered by the plaintiffs in error tended to show that the box contained $25,000 of United States treasury notes, and so far as the question in hand is concerned, the only disputed fact was the amount of money that had been destroyed in the box.

At the close of the evidence, and under this state of facts, the plaintiffs in error requested the Court to charge the jury as follows:

"If the jury believe from the evidence that the alleged deficiency of $25,000 was contained in the bank box in said vault in the form of paper currency, to-wit., United States treasury notes, and that all of said money was destroyed by fire while so contained in said vault, and that the remnants and debris thereof were delivered by Smythe to the proper representatives of the United States Government who were authorized to receive it, then I charge you that under the evidence the Government has not suffered any substantial damages by the destruction of its own obligations, and your verdict, if in favor of the plaintiff, can in no event exceed nominal damages." (Bill of Exceptions No. 3, Trans. p. 18).

This the court declined to do, for the reason that, in its opinion, the charge requested ignored the elementary distinction between obligations to indemnify and obligations do specific things; that as against the latter obligations the plea *non est damnificatus* would not avail (Trans. p. 22);

and as he considered it beyond all question that the obligation of Smythe's bond was for the performance by him of specific things as contradistinguished from an obligation to indemnify or make good any loss the Government might suffer by a breach of his legal duty, the Circuit Court was of the opinion that the mere breach of duty by Smythe made the obligation of the sureties absolute, and that it was not incumbent upon the Government to prove any damages resulting from such breach; nor was it permissible to the plaintiffs in error to show that the Government had in fact suffered no substantial injury by such breach.

We submit that the fundamental error of the trial court lay in holding that the bond in question was an obligation to do specific things as distinguished from an obligation to repair and make good any damage the Government might suffer by a breach of duty on the part of Smythe or his subordinates, and in treating the penalty of the bond as liquidated damages rather than as a *penalty* properly so-called.

The condition of Smythe's bond as Superintendent of the Mint at New Orleans was, that he "shall faithfully and diligently perform, execute and discharge, all and singular, the duties of said office according to the laws of the United States." (Trans. p. 164). This bond was given under Sec. 3501 of the United States Revised Statutes, which provide, "that the superintendent of each mint shall give a bond for the faithful and diligent performance of the duties of his office." In our view, the bond executed by the plaintiffs in error was an ordinary penal bond obligating them to repair and make good any damage which the Government might suffer by reason of the neglect or breach of duty by

Dr. Smythe or any of his subordinates for whom he would be responsible. We think this is demonstrated:

1st. By a consideration of the character of the obligation and of the purpose of the law under which the bond was given;

2d. By the uniform interpretation which the law and executive officers of the Government have placed upon its conditions; and

3d. By the intepretation which this Court placed upon an obligation of a similar nature in the case of **United States vs. Morgan** in the **11th Howard Reports** and in other cases.

I.

Nature of Obligation and Purpose of Statute.

It may be stated that an official bond differs in no material respect from an ordinary penal bond, except perhaps that the obligation thereof may *always* be satisfied by indemnifying the obligee to the extent of the injury occasioned by its breach. The sum stipulated to be paid has uniformly been held to be a penalty and not an agreed or liquidated damage.

"Whether the amount agreed by a bond to be paid, forfeited, or lost, is a penalty or liquidated damages, is a question which can rarely occur in reference to a strictly official bond. The penalties of those bonds are almost invariably penalties strictly so-called, but in many less regular instruments, which, nevertheless, are bonds upon condition, the question may very well arise." **Murfree on Official Bonds, Section 612.**

A penalty is that sum of money which the obligor in a bond binds himself and agrees to pay in case of a breach of the condition attached to and made part of the obliga-

tion. Originally, upon breach of the condition, the liability for the entire amount of the stipulated penalty became absolute, and the imprudent or unfortunate obligor might be compelled to pay the whole amount of the penalty, although the damage or loss from the breach of the condition was comparatively insignificant. (**2 Blackstone's Commentaries, 341**). Relief against this injustice was afforded, first, by appeal to a court of equity, and afterwards, courts of law following the example of the Court of Chancery, relieved against the penalty of a bond upon condition so far that the principal of the debt, on demand, with interest and costs, should be paid into court. (**Burridge vs. Fortescue, 6 Mod. 60**). By **Statute of 4 and 5 Ann, Chapter 16,** this practice received the sanction of Parliament. In more modern times, the rule was still further relaxed, so that at present the judgment is for the penalty, but to be discharged upon the payment of the debt and damages as assessed by the jury, and the costs of the suit.

The practical effect of these changes in the law is that the penalty of a bond never operates now as a forfeiture, but merely fixes the maximum of the liability of the obligor.

It is undoubtedly true that the courts of this country habitually regard the sums stipulated in a bond of the ordinary form to be paid by the obligor to the obligee as a penalty or security for the performance of the condition, and not as liquidated damages, or an amount absolute to be paid upon its breach. The presumption that the sum named is intended as a penalty, as the maximum to which the obligee can become entitled, can only be controlled by very strong considerations. When an obligor has bound

himself not to exercise a certain trade in a certain place under a penalty stated in the bond, the court will be more inclined than in other cases to regard the sum named, not as a penalty, but as agreed or stipulated damages for the breach of the condition, but, if, having it in their power to make it clear that they meant the sum stated to be liquidated damages, they omit to do so, the character of the transaction will not of itself suffice to induce the court to depart from the general rule, which is to regard such sums so stipulated as mere securities for the performance of the condition.

Davis vs. Gillett, 52 N. H. 126.
Astley vs. Weldon, 2 Bos. & P. 346.
Street vs. Rigley, 6 Ves. Jr. 815.
Price vs. Greene, 16 Mees. & W. 346.
Davies vs. Penton, 6 Barn. & C. 216.
Higginson vs. Well, 14 Gray, 165.
Smith vs. Wainright, 24 Vt. 97.
Richards vs. Edict, 17 Barbour, 260.

The rule on this subject is thus stated by Chief Justice Marshall: "In general, a sum of money in gross to be paid for the non-performance of an agreement is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of the contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties." **(Tayloe vs. Sandiford, 7 Wheaton, 13).** And it has been said in a Massachusetts case, that it must be proved that the stipulated

sum was liquidated damages, for "it is not always the calling of a sum to be paid for the breach of a contract liquidated damages which makes it so. In general, it is the tendency and preference of the law to regard a sum stated to be paid if a contract is not fulfilled as a penalty and not as liquidated damages; because it may then be proportioned to the loss actually sustained." **(Wallis vs. Carpenter, 13 Allen, 19, 25).**

It is true, however, that the general rule on this subject is to some extent controlled by the question whether the contingency guarded against is single, comprising only a particular specified act in regard to which damages may arise in case of default, or whether the covenant be to perform several things or else to pay the sum specified. In the former case, it is said that although the policy of the courts is, if possible, to view the sum agreed upon as a penalty, yet, unless there are words evincing an intention that the sum reserved in case of a breach shall be due only as a penalty, such sum may be recovered as liquidated damages. **(Swift vs. Crow, 17 Ga. 609; Leighton vs. Wales, 3 Mees. & W. 545).** If, however, the contract be to perform several acts, or else to pay the sum specified, that sum, it is well settled, will always be regarded by the courts as a penalty and not as liquidated damages.

Swift vs. Crow, 17 Ga. 609.

Astley vs. Weldon, 2 Bos. & P. 345.

Kemble vs. Farren, 6 Bing. 141.

Davies vs. Parton, 6 Barn. & Cr. 210.

Niver vs. Rossman, 18 Barbour, 50.

And so rigid is this rule, that although the parties in so many words, and in express terms, stipulate that the sum

inserted in the agreement shall be liquidated damages and shall not be a penalty, the courts will, nevertheless, hold it to be a penalty unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. Thus, there was a contract between a theatrical manager and an actor, by which the former agreed to pay the latter for his services 3 pounds, 6 shillings, and 8 pence, every night for a stated period, and that he should have a benefit each season on certain terms, the actor agreeing to be principal comedian in the company for four seasons. And it was agreed that if either party violated the agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000 pounds, to be liquidated and ascertained damages, and not a penalty or penal sum in the nature thereof. The actor broke his engagement, and the manager obtained a verdict for 750 pounds, subject to be increased to 1000 pounds if the court should be of the opinion that that sum was legally stipulated in the agreement as liquidated damages. There was a rule *nisi* to that effect, which, after argument, the court discharged, holding that the sum of 1000 pounds expressed in the agreement was a penalty and not liquidated damages. **(Kemble vs. Farren, 6 Bing. 141).**

Furthermore, there is a very material distinction which should always be borne in mind, between bonds given to secure the performance of covenants properly so-called, and bonds for the payment of money. In the latter class of cases, whenever the performance of the condition would imply the payment of a sum certain by the obligor to the obligee, the rule is that if the amount due to the obligee

by reason of the breach of the condition, together with the interest thereon, exceeds the penalty of the bond, the judgment will be for the full amount of the bond, interest and costs. **(Lyon vs. Clark, 8 N. Y. 148).** And this rule has been forced and enforced even against a surety. **(Harris vs. Clapp, 1 Mass. 308).** In the former class of cases, where bonds are given for the performance of covenants, and the breach does not imply the payment of a sum certain, and damages do not follow as a mathematical sequence, as in case of interest, it is safe to follow the *dictum* of DeGrey, Chief Justice: "The bond ascertains the damage by consent of the parties. If, therefore, the defendant pays the plaintiff the whole stated damages, what can he desire more?"

Brangwin vs. Parrot, 2 W. Blackstone, 1190.

Clark vs. Bush, 3 Cowen, 151.

A case directly in point is **Higginson vs. Weld, 14 Gray, 165.** In that case H made an agreement with W, a shipowner, as follows:

"It is understood that said ship is on a voyage to Australia, thence to Calcutta, where she is to load for Boston; and H agrees to furnish 150 tons of goods from Calcutta, paying a freight of $14.50 per ton. W agrees that said ship shall be kept in suitable order for the voyage, and that he will receive said freight on the terms named, the damages of sea and fire excepted. Penalty for the non-performance of this agreement by either party $2200."

The Master, in violation of his orders, did not go to Calcutta, but sailed from Australia to another port. It was held that the contract of W was absolute, and was broken by the failure of the vessel to be at Calcutta to receive her cargo. The assignee of H sued for the penalty.

The Court, at page 173, said:

"But further, and applying a rule which is amongst the most important in determining whether the sum named is to be treated as a penalty or as liquidated damages, it appears very clearly by the contract that the penalty named would be alike incurred by the non-performance by either party of any of its numerous stipulations; and that the actual damage caused by a failure to perform some of them might be very trifling in amount and capable of very exact pecuniary estimation. If, for example, the plaintiffs had failed to furnish 5 or 10 tons of stipulated cargo; or if the defendant had failed in some trifling particular to keep the ship in proper order for the voyage, so that one or two packages of goods had been injured, can it be supposed that it was in the contemplation of either that so serious a consequence should follow? The penalty would be the whole of the sum to be paid for a breach of the whole contract; and it would be unjust and oppressive to require either party to pay it for violating any one of the least important items.

"We are then brought to the consideration of the actual amount of damages which the plaintiffs have sustained. The defendant should pay such a sum as would place the other party in as good a pecuniary condition at the time the contract was broken as if it had been performed."

Regarding now in the light of these authorities the terms of the bond itself, we believe that the conclusion is inevitable that the sum stipulated is to be considered a penalty and not an agreed or liquidated damage, and is recoverable only upon proof of damage, and then only to the extent shown.

Section 3501, U. S. Rev. Stat., provides:

"The superintendent * * * before entering upon the execution of their respective offices, shall become bound to the United States with one or more sureties, approved by the Secretary of the Treasury, in the sum of not less than ten nor more than fifty thousand dollars, with con-

dition for the faithful and diligent performance of the duties of his office, * * * and the Secretary of the Treasury may, at his discretion, increase the bonds of the superintendent."

Upon his appointment, Smythe gave bond in the sum of $100,000, with D. C. McCan and Edward Conery as sureties, conditioned "if the said Andrew Woods Smythe shall faithfully and diligently perform, execute, and discharge, all and singular, the duties of said office according to the laws of the United States, then this obligation to be void. * * *"

While the language of the condition of the bond is not in the exact words of the statute, the effect is the same.

There is nothing in the language of the bond to indicate that it was the intention of the parties to make the sum stated liquidated damages, and under the principle laid down in the cases cited *supra*, the Court will not give such an interpretation to the contract unless constrained to do so by the clear and unambiguous language of the contract.

It may be further noted that this bond was not given to secure the performance of a single act, or to secure the payment of a certain sum of money, or even to secure the performance of one or more acts of the same character. It was a general security for the performance of Smythe's official duties, and a reference to the statute defining these duties will show how diversified in character and importance they are. Some of the duties imposed upon him are of great importance, such for example as the care and custody of the bullion and moneys of the mint; and some of minor importance, as for example that he shall forthwith report to the Director of the Mint the names, duties, com-

pensation, etc., of all persons appointed by him. It requires some seven articles of the Revised Statutes (Secs. 3502-3507) to cover in general terms the divers duties of the superintendent. His duties are more particularly and extensively defined in the various regulations which by law the Director of the Mint is authorized to make. A failure to perform faithfully and diligently some of these official duties would entail great loss upon the Government; a failure in respect of others would occasion no damage or loss whatever.

As the bond does not particularize that it was to secure the performance of any particular or specified duties, but was to secure generally the performance of all the official duties of the officer, it must follow, if the lower courts be correct in their interpretations, that the Government has stipulated for liquidated damages in the sum of $100,000, and is as much entitled to this sum for the infraction of the most trivial and unimportant official duty imposed by law upon the superintendent, as for the loss of bullion, or the neglect of the most important duty to be performed by him. We invoke against this interpretation the rule of Kemble vs. Farren, *supra*, and the cases cited in connection therewith, as well as the common sense interpretation of business men managing the affairs of the Government.

In our humble opinion, the purpose for which officers are required to give bond and sureties for the discharge of their official duties is to make the bond a security for any damage that may be sustained by reason of any breach of their official duty. No action can, we submit, be sustained for recovery of substantial damages, unless there have been such damages sustained as would give the party

a right to maintain an action on the case. And to sustain an action on the case, it must appear that the plaintiff has suffered damage, that the defendant has committed a tort, and that the damage is the clear and necessary consequence of the tort. Upon these principles, the neglect of clerks to give notice to guardians to renew their bonds, it has been held, did not make them liable to suits upon their bonds, because the damages would necessarily be uncertain and conjectural, and because a penalty for such neglect was provided by statute. **(Jones vs. Biggs, 1 Jones N. C. 364).**

So, too, it has been held, that although the State may maintain a civil action on a sheriff's official bond for official delinquency in criminal cases, yet, unless some damage result from the breach of the bond, the action cannot be sustained. **(Commonwealth vs. Reed, 3 Bush Ky. 516).**

It could hardly be conceived that it was the intention of Congress, or of the officers of the treasury to make it possible that the Superintendent of the Mint and his sureties should be mulcted for the penalty of his bond for his failure to perform each or any one of the duties fixed by the statute, irrespective of damage to the Government resulting from such failure or neglect of duty. Yet such is the interpretation which the learned trial Judge placed upon this bond, and we think it is only necessary to illustrate his theory to demonstrate its unsoundness. For example, if the Director of the Mint had ordered that the quarter yearly accounts of the Superintendent (Sec. 3504) be filed in his office before the 10th days of January, April, July and October, it would, under the statute, clearly be the legal duty of the Superintendent to so file his accounts, and if not done, there would be a failure or neglect to faithfully or diligently perform

the duties of the office according to the laws of the United States. No damage, however, may have resulted to the Government by the filing of the reports, say, on February 10th instead of January 10th. Yet, if the theory of the lower court be correct, there having been a failure on the part of Dr. Smythe to perform the specific thing required of him by law, the Government could insist on the full penalty of the bond, because the bond, being an obligation to do a specific thing, in his opinion it was not necessary to show that any actual damage had resulted from the breach.

Again, it is the Superintendent's duty to safely keep all bullion and deliver it when legally demanded. Suppose that when called upon to deliver all the bullion he had received, there was a deficiency of a few ounces of gold. Under the ruling of the lower court, the penalty of the bond becomes due, and it would not be incumbent upon the Government to show the value of the gold that was lost nor would its recovery be limited to such value.

We think it perfectly plain that the statute contemplated that the bond was to secure the Government from loss, and to insure the reparation of any loss or damage it might suffer by any failure or neglect of duty on the part of the Superintendent. To place any other construction upon it, considering the manifold and divers duties to be performed by the Superintendent, varying greatly in importance, would be to impute to Congress the intention of not only securing the Government against any loss, but making it possible for such officer to be ruined should he be guilty of the least infraction of the law.

II.

Interpretation of Condition of Such Bonds by the Officers of the Government.

In the second place, the officers of the Government have always construed the condition of such bonds to be an obligation to indemnify. In all the reported cases of suits on bonds of custodians of Government funds or property, your Honors will find that the amount claimed was merely the value of the money, bullion, or things lost or not accounted for, and never the penalty of the bond irrespective of the damage sustained. Even in this case, the Government did not sue for the penalty of the bond, but for the amount of a loss thought to have been sustained by it by the loss or theft of this money. In the **Bobyshell Case, 77 Federal, 944,** it was the value of the bullion lost and not the penalty of the bond sued for. Yet, in that case, if the theory of the trial court is correct, it was not necessary for the Government to show the damage it had suffered by the loss of this bullion, namely, its value, but it could have sued for the stipulated penalty upon the mere failure of Bobyshell to "safely keep until legally withdrawn all * * * bullion which shall be for the use or expenses of the Mint," of which he was Superintendent.

In the cases of **United States vs. Prescott, 3 Howard, 578; United States vs. Dashiel, 4 Wall. 182; United States vs. Koehler, 9 Wall. 83; Boyden vs. United States, 13 Wall. 17; United States vs. Bevans, 13 Wall. 56, and United States vs. Thomas, 15 Wall. 337,** the amount sued for was the damage sustained by the Government and not the penalty of the bond.

We venture the assertion that no case can be found in

which a Court of the United States has for a breach of duty by an accounting officer of the Government held him or his sureties for the penalty of the bond or for any other amount whatever, irrespective of the damages sustained by reason of such breach.

This uniform interpretation of the nature of the obligation of official bonds by the law and executive officers of the Government, who were the ones that prepared the form of the bonds, whose duty it was to enforce the obligation thereof, evidences in a conclusive way the intention that the penalties of such bonds were intended to be *penalties* and not liquidated damages.

III.

Decisions By This Court.

This uniform interpretation by the officers of the Government of the nature of the condition of this bond, no doubt is based upon the decision of the United States Supreme Court in the case of **U. S. vs. Morgan et al., 11 Howard, 154,** which was decided at the December term of 1850, the plain effect of which decision was to hold that a bond for the faithful performance of the duties of a public office was an obligation to indemnify against loss.

In that case, suit was brought by the United States against Thomas Gibbs Morgan and the sureties on his official bond as Collector of the Port of New Orleans to recover the sum of $274,775.17, the amount of certain monies and treasury notes received but not accounted for by him.

The bond sued on was in the usual form and conditioned that said Morgan "has truly and faithfully executed and discharged, and shall continue truly and faithfully to exe-

cute and discharge all the duties of the said office," and the penalty was fixed at $120,000.

It was alleged in the petition of the Government that the condition of the bond had been broken in that said Morgan had not truly and faithfully discharged nor continued truly and faithfully to discharge the duties of the said office, for that as such Collector he had received large sums of money which he had failed or refused to deliver on legal demand. The answer was a general denial. The verdict and judgment was for $60,569.67. The United States sued out a writ of error to the Supreme Court, assigning as error the refusal of the trial court to instruct the jury that the defendants were liable for the loss of certain treasury notes.

Reviewing the action of the trial court in this respect, the Supreme Court, through Mr. Justice Woodbury, said:

"The other instruction presents a question of more difficulty. It was, that the collector was not liable for the treasury notes which he had received for duties if they had been duly canceled, after received, and were put up and ordered to be delivered at the post-office for transmission to the Treasury Department though they were lost or purloined (without his knowledge or consent) before placed in the charge of the post-office.

"A majority of us think that this instruction also was erroneous. It is manifest that, if the notes though canceled for security in keeping them till transmitted, were still to be regarded for any purpose as money, the collector must be considered as liable for their amount till paid to the Department, or actually delivered at the post-office, in conformity with the orders of the Department. It would then be a liability on his bond to pay over what money he had received, as that manifestly had not here been done; or it would be a liability to perform his duty as promised in his oath and bond, and as required by law and treasury in-

structions,—to transmit or pay over the notes, and which, considering them as money, it cannot be pretended he has done. On this it is enough, in support of his continued responsibility, to refer to the United Stales vs. Prescott, 3 Howard, 578.

"But were these notes, when lost, still money?

"It is true that originally they were by law to be received as money. (Act of 12th October, 1837, 5 Stat. at Large, 202, paragraph 6). The fact that he is liable for the interest on these notes after received and canceled, and until they reach the Department, appears to favor the idea that the notes were still, for some purposes at least, to be treated as continuing money between the collector and the Department. (5 Stat. at Large, 203, paragraph 7).

"But if this view be not clearly sustainable, and we doubt whether, under all the circumstances, after canceled, they can be regarded as money, or money's worth, for the purpose of sustaining this action, yet it is clear that they still possess some value as vouchers, and as evidence from the Treasury Department that they have been redeemed.

"It is still clear, also, that, though canceled, the Treasury Department, unless having possession of them, is exposed to expense and loss by their being altered, and the cancellation removed or extracted, and their getting again into circulation, as two did here, and being twice paid by the government.

"For that reason, these notes, though canceled, are, by law and treasury orders, to be transmitted to the Treasury Department, and when received there are to be credited to the collector; but not till then, as a general rule. If the collector, therefore, fails to send them there, or to do all which is proper to get them there, by having them put into the actual possession of some public transmitting agent like the post-office, he fails in his duty; and it is not enough for him to say in justification, as in this case, and as the court below upheld, that he gave orders to the accustomed servant to put them in the post-office.

"That servant was his own agent, and not the Agent of the Treasury Department. He allowed the notes to be lost

or stolen before reaching the post-office. His employer must suffer by his neglect or unfaithfulness rather than third persons. The condition of the bond of the collector has, therefore, in this view never been fulfilled, and *prima facie* he is technically liable for its penalty, and is in justice, as well as law, responsible for the amount of the injury thus caused by himself or his own agent.

"The rule of damages would be the amount of the notes, unless it appeared, as here, that they had been canceled, and unless it was shown that the government had suffered, or was likely to suffer, damage less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial.

"Only that amount rather than the whole bond need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. And if any equities exist to relieve him from that, none of which are seen by us, it must be done by Congress and not the courts of law.

"Anything less than this—any less strict rule, in the public administration of the finances, would leave everything loose or unsettled, and cause infinite embarrassments in the accounting offices, and numerous losses to the government. * * *

"*Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting them in the post-office so as to be returned.* (*5 Stat. at Large, 203*). *But how much this damage was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the*

breach of the condition of his bond, and of his instructions under it." (Italics ours).

The case of **United States vs. Moore, 2 Brock. 317 (26 Fed. Cases, 1301)**, was a suit by the United States upon the official bond of the United States Marshal, conditioned for the faithful performance of his duties as Marshal of the District of Virginia, for the failure of his deputy to serve original process, whereby it was claimed certain debts due the United States were wholly lost. Chief Justice Marshall, sitting in the Circuit Court, held that the measure of liability was the extent of the injury received by the plaintiff produced by the failure of the Marshal to properly perform the duties of his office.

It seems to us that the cases above cited are conclusive of the question in this case, and we submit, therefore, that the foregoing considerations show that the trial court misconstrued the nature of the obligation of the bond here sued on, and that under the terms of this bond the Government had the right to recover only such damages as it might have proven had been occasioned by the breach of duty on the part of Dr. Smythe in not safely keeping this paper currency. And if this contention be correct, then we think it follows that under the evidence the plaintiffs in error were entitled to have the jury instructed as requested by them. For if, as a matter of fact, there were $25,000 of treasury notes or other obligations of the Government in the bank box, and same were burned, and the entire debris thereof was delivered to the Government,

how can it be claimed that the Government has suffered any substantial damages by the destruction of its own promissory notes or obligations? It seems plain to us under such a state of facts that the only loss suffered by the Government was the value of the paper and the expense of printing the notes, and as no evidence was offered to show these items, nothing but nominal damages were recoverable for the technical breach of the obligation to safely keep these notes.

And we submit that the Court erred in refusing to instruct the jury, as requested by the plaintiffs in error, and the judgment should be reversed.

THIRD POINT.

The Circuit Court erred in directing the jury to find a verdict for the defendant in error for twenty-five thousand dollars, when the Government's own evidence showed that the deficiency was only $23,818. And the Circuit Court of Appeals erred in affirming said judgment.

(Assignments of Error Nos. 5 and 6).

The Government in this suit claimed in its petition that there was a deficiency in the paper currency of the Mint amounting to $25,000, which sum it was alleged Smythe had failed to account for and turn over to the Government when demanded. The court directed a verdict against the plaintiffs in error for this amount, in the face of the fact that the Government's own experts and witnesses testified that Smythe had delivered to them burnt or charred bills, representing part of said deficiency, amounting to $1182.

Upon the theory that this was a credit or offset claimed by an officer on or against a debt due the United States,

the Court declined to limit the recovery of the defendant in error to the sum of $23,818. **(U. S. Rev. Stat., Sec. 951).**

(See ruling of court, Trans. page 163).

The claim made by the plaintiffs in error for a diminution of the amount claimed by the Government to the actual amount shown by its own testimony to have been lost, and not accounted for, viz: $23,818, was not, within the meaning of Section 951, the claiming of a credit. The Government itself showed it had no right to recover more than that sum, by proving that all the bullion and currency of the mint had been accounted for and delivered to the proper authorities by Smythe, except $23,818; and it is submitted that the Circuit Court erred in directing a verdict for $25,000.

FOURTH POINT.

The Circuit Court erred in allowing interest from April 1, 1893. And the Circuit Court of Appeals erred in affirming said judgment in that respect.

(Assignment of Error No. 7).

The fire occurred June 24th, 1893, and it was not until February 9th, 1894, that notice of the shortage was served on the sureties as required by the Act of Congress, approved August 8th, 1888, 25th Statute, 377 (Tr. p. 191); and judicial demand was not made until August 7th, 1894. the date this suit was filed.

It was, therefore, clearly error, as sixthly assigned, to decree interest from April 1, 1893. If this suit is, as is claimed by the District Attorney, for the recovery of a penalty for a breach of duty on the part of Smythe, no interest can be allowed, for interest on a penalty, unless expressly

stipulated in the bond or declared by some Statute, is not recoverable. But if it is an action to recover a deposit, as we claim it is, interest is due only from the date when a demand is shown to have been made on the bailee for the money; but as no demand is alleged to have been made prior to the notice of February 9th, 1894, interest is recoverable only from that date. In any view of the case, it is impossible for the Court to sustain a judgment for interest from April 1, 1893, when the money for which the sureties are chargeable, if at all, was not destroyed or lost until June 24th or 26th, 1893.

FIFTH POINT.

It was error to render an absolute, executory judgment against the plaintiff in error, Byrnes. And the Circuit Court of Appeals erred in affirming the judgment in that respect.

If the Court should be of the opinion that the foregoing assignments of error are not well founded, then we submit that it was error, under the law of Louisiana, to render an absolute judgment against an administrator, and for that reason, failing the other assignments, a *venire de novo* should be ordered, unless the Government consent to the modification of the judgment to make same, so far as Byrnes is concerned, payable in due course of administration.

Respectfully submitted,

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